

Fighting Outside the Ring: A Labor Alternative to the Continued Federal Regulation of Professional Boxing

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Inside the ring, boxers fight for their lives. Their safety is at risk. Outside the ring, boxers are financially vulnerable. They must associate with the right managers and promoters in order to realize a big payday. Currently, there is little federal regulation of the sport of boxing and little uniformity among state regulations. This inadequate regulation scheme puts boxers' safety and financial future in jeopardy. This Note proposes that boxers organize under the NLRA to achieve appropriate regulation of the sport. This Note examines the current lack of effective regulation and discusses organization under the NLRA as a means of protecting boxers' physical and financial well being.

I. INTRODUCTION

On New Year's Day 1995, Gerald McClellan was a world champion professional boxer¹ who regularly fought for six-figure purses and was looking forward to a title bout that could net him over a million dollars.² By New Year's 1996, McClellan was a deaf and blind³ multiple-stroke victim⁴ who relied day-to-day on trust fund donations because his own assets had been exhausted.⁵

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¹ See Richard Hoffer, *Enough?*, SPORTS ILLUSTRATED, Mar. 6, 1995, at 24, 26 (discussing how, at the time, McClellan was the World Boxing Council (WBC) middleweight champion).

² McClellan was "angling for a huge money bout" on pay-per-view television with International Boxing Federation super-middleweight champion Roy Jones, Jr. See Richard Hoffer, *Dark Days*, SPORTS ILLUSTRATED, Mar. 4, 1996, at 82, 90 ("All he had to do to attain financial security was stay on track, and only for a little while. Another quick and brutal fight and he would have been a pay-per-view force in boxing.").

³ See *id.* at 84 (describing McClellan's coming to grips with his blindness, while being cared for by his family, "Now why, when he thinks about it, would it be dark 24 hours—three sisters' worth—a day? It's odd.").

⁴ See *id.* at 85 ("In London, where he had emergency brain surgery immediately after the bout and spent two months in a coma, McClellan had two strokes and, supposedly, a heart attack.").

⁵ See *id.* at 90 (describing the medical bills and legal battles over McClellan's

The cause of the physical tragedy was the beating McClellan took at the hands of World Boxing Council (WBC) super-middleweight champion Nigel Benn on February 25, 1995.⁶ McClellan was knocked out in the tenth round of the brutal fight⁷ and fell into unconsciousness after being led back to his corner. He was then rushed to a hospital where he needed emergency surgery to save his life.⁸

However, while the bout itself caused the physical tragedy, the financial disaster that struck McClellan was due in part to the lack of a sport-wide pension or disability insurance fund⁹ to help defray the costs of McClellan's medical bills. While McClellan's sudden injury was unusual, if not unique,¹⁰ many fighters retire with some chronic ailment as a result of the sport,¹¹ while others who have

guardianship that have exhausted his savings). Fighters such as Roy Jones, Jr. and Riddick Bowe promised to contribute percentages of their fight income to the trust fund. However, as of March 1996 the trust fund had "hardly any income . . . and the money dribbles away. [McClellan's father] Emmitt imagines his son's trust fund could be exhausted in six months, maybe a year . . ." *Id.*

⁶ See Hoffer, *supra* note 2, at 84.

⁷ See *id.* (describing how McClellan's "savage fight with Benn . . . ended when McClellan suddenly fell to his knees. . ."); see also Jack McCallum, *Scorecard: Bad Decisions*, SPORTS ILLUSTRATED, Feb. 26, 1996, at 30, 33 (criticizing two prominent boxing magazines, *KO* and *Boxing Illustrated*, for naming the McClellan-Benn bout "Fight of the Year").

⁸ See Hoffer, *supra* note 1, at 27 (describing the neurological team at the boxing site and the contingencies in place to rush severely injured boxers to an area trauma center).

⁹ See Kelley C. Howard, *Regulating the Sport of Boxing—Congress Throws the First Punch with the Professional Boxing Safety Act*, 7 SETON HALL J. SPORTS L. 103, 103 (discussing the inadequacy of insurance coverage for fighters); *Scorecard: A Crippling Need*, SPORTS ILLUSTRATED, July 3, 1995, at 14, 14 (stating that professional boxing is one of few major sports without an industry-wide pension fund).

¹⁰ Other fighters, such as Rae Duk Koo Kim and Jimmy Garcia, have suffered massive brain injuries during a single bout. See, e.g., *Australian Boxer Dies After Fight*, WASH. POST, May 1, 1996, at B02 (detailing the death of featherweight boxer Lance Hobson from brain hemorrhage and describing the death of Duk Koo Kim); Richard Hoffer, *Glory and Sorrow*, SPORTS ILLUSTRATED, May 15, 1995, at 48, 49 (detailing a fight between Gabriel Ruelas and Jimmy Garcia that left Garcia in a coma).

¹¹ See Kevin M. Walsh, *Boxing: Regulating a Health Hazard*, 11 J. CONTEMP. HEALTH L. & POL'Y 63, 67 (1994) (discussing the fact that boxing has the highest morbidity rates and potential for neurological damage of any of the major sports). The theory of chronic brain trauma in veteran professional fighters is well-known as "punch drunkenness" but is more accurately Parkinson's Syndrome—a neurological disorder that causes tremor, muscle rigidity, and slowed movement. While Parkinson's Syndrome is a symptom of Parkinson's Disease, it can also develop through repeated blows to the head. Muhammad Ali is perhaps the most famous example of a Parkinson's Syndrome victim. See THOMAS HAUSER, MUHAMMAD ALI: HIS LIFE AND TIMES 488–94 (1991) (quoting Columbia University neurologist Stanley Fahn in detailing the causes and symptoms of Ali's Parkinson's Syndrome). In a study of 30 professional fighters conducted by neurologist Barry Jordan of the UCLA medical center, 63% had neurological abnormalities and 10% of those boxers showed signs of severe neurological

made millions during their careers retire penniless, due to financial abuse at the hands of their managers and promoters.¹² Conversely, the vast majority of boxers—the “journeymen” who fight for small purses in local bingo halls and small-town convention centers—do not earn enough money to allow them to save for their lives after the sport.¹³ Without a pension plan, these fighters often retire from boxing with no financial security.

During his¹⁴ career, the fighter often finds himself with no assistance in

damage. See Barry Jordan et al., *Jorda Apolipoprotein E 4 Associated with Chronic Traumatic Brain Injury*, 278 J. AM. MEDICAL ASSOC. 136, 138 (1997); see also FERDIE PACHECO, MUHAMMAD ALI: A VIEW FROM THE CORNER 199–205 (detailing the effects of Parkinson’s Syndrome in fighters and the increased risk of physical injury to a Parkinson’s-affected boxer who continues to fight); Beverly Merz, *Is Boxing a Risk Factor for Alzheimer’s?*, 261 J. AM. MEDICAL ASSOC. 2597, 2597–98 (1989) (discussing the possibility that boxers may be at a higher risk for Alzheimer’s disease); see generally Ross Rosen, *In the Aftermath of McClellan: Isn’t It Time for the Sport of Boxing to Protect It’s Participants?*, 5 SETON HALL J. SPORTS L. 611 (1995) (discussing the likelihood of boxing injuries and examining studies on safety measure implementation to reduce the risk of both acute and chronic boxing injuries).

¹² See, e.g., *Hearings on Muhammad Ali Boxing Reform Act*, S.2238 Before the Senate Commerce, Science, and Transportation Committee, 105th Cong. (1998), available in WESTLAW, U.S. Testimony [hereinafter *Hearings on Boxing Rules Revision*] (statement of Mike Tyson) (“The opportunity for abuse [in boxing] is gigantic. . . . [A]s the absence of meaningful regulations in this industry has allowed others to run in an open field with my finances. . . . I am currently coming to fully understand how over \$65 million was taken from me in less than 24 months.”); THE RING: BOXING IN THE 20TH CENTURY 75 (Steven Farhood, ed.) (1993) (discussing Joe Louis, former heavyweight champion from 1937 to 1949, who “owed the Internal Revenue Service \$1.2 million shortly after his retirement. At the time his annual income was \$20,000.”); Ronald Grover, *The P.T. Barnum of Fist City*, BUS. WEEK, Nov. 18, 1996, at 96, 100 (discussing alleged misappropriations of millions of dollars by promoter Don King from former boxing champions Muhammad Ali and Tim Witherspoon).

¹³ See 138 CONG. REC. S5658, S5662 (daily ed., Apr. 28, 1992) (report presented by Sen. Roth) (“[F]or every boxer who steps into the spotlight in Atlantic City or Las Vegas for a multimillion dollar title fight, there exists a multitude of fighters scrounging to make a living on the club fight circuit, oftentimes sacrificing their well-being in the process.”); Randall Lane, *Pugilism’s Lopsided Economics: Why Does George Foreman Get \$10 Million for One Fight While Another Ex-Champ Gets \$250 for Eight Bloody Rounds?*, FORBES, Dec. 18, 1995, at 202, 204 (“The five fighters on this year’s Forbes Super 40 . . . superstars all, collectively earned over \$100 million. The world’s other 5,000 pro fighters . . . earned . . . on average under \$20,000 (usually far under), not a lot of money for the risk of having your brains knocked out.”) (parenthetical in original).

¹⁴ The sport of female boxing is in its inception. See, e.g., Nancy Foley, *Bad Intentions*, WOMEN’S SPORTS & FITNESS, Apr. 1998, at 32, 33; Evelyn Nieves, *A Boxer in a Hurry*, N.Y. TIMES MAG., Nov. 3, 1996, § 6 at 38; William Plummer & Meg Grant, *Woman Warrior: Boxer Christy Martin Crushes Opponents and Stereotypes*, PEOPLE, June 24, 1996, at 101, 101. Many of the arguments in this Note could pertain to female as well as to male boxers. However, because of the lack of anecdotal information regarding female professional fighters, this Note will make its argument only regarding male boxers. Thus, masculine pronouns are used.

selecting and negotiating contractual terms with a manager,¹⁵ or in dealing with promoters¹⁶ and private agencies that sanction professional bouts.¹⁷ Additionally, the laws designed to protect a fighter—from unscrupulous managers and promoters as well as from dangerous fight conditions—vary widely across the country.¹⁸ Each state has its own safety guidelines; licensing qualifications for boxers, promoters, and managers; contest judge and referee selection criteria; minimum fighter purses; et cetera.¹⁹ Thus, a fighter faces a greater chance of severe injury in one state than in another due to differences in safety standards; and a promoter facing allegations of fight fixing in one state may become licensed to arrange fights elsewhere.²⁰

This broad range of rules and the abuse it has allowed have brought about repeated calls for strict federal regulation of the sport.²¹ However, after numerous hearings and proposed legislation over the past eight years, Congress has provided only the bare minimum in safety standards.²² The main reason for this failure to fully regulate boxing at the federal level has been a combination of strong resistance from those in charge of the sport, combined with congressional

¹⁵ See *infra* notes 31–38 and accompanying text. The manager is the fighter's primary connection regarding the sport's business relationship and wields a great deal of financial control over the fighter, often acting as the boxer's agent, chief financial advisor, and sponsor.

¹⁶ See *infra* notes 41–62. Once signed to a contract, the promoter wields significant control over a professional boxer's career.

¹⁷ There are at least three major international sanctioning bodies (the World Boxing Council (WBC), the International Boxing Federation (IBF), and the World Boxing Association (WBA)), as well as numerous minor sanctioning agencies that set their own contest rules (in accordance with applicable state law), rank member fighters, and name champions. For a detailed discussion of the role of the sanctioning agencies, see *infra* notes 68–79 and accompanying text.

¹⁸ See *infra* notes 80–96 and accompanying text; see also e.g., *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Larry Hazzard) (discussing the multitiered boxing safety and licensing regulations in New Jersey); *Hearings on Professional Boxing Before the House Subcomm. on Commerce, Trade, and Hazardous Material*, 103d Cong. (1996), available in WESTLAW, U.S. Testimony (statement of Rep. John Dingell) (discussing the inconsistency between states regarding regulations).

¹⁹ See *infra* notes 80–96 (discussing the inconsistency among the various states regarding regulatory subjects dealing with boxing).

²⁰ See Gerard Shields, *Boxer Recants Dive Tale*, ORLANDO SENTINEL, Sept. 23, 1994, at D1 (discussing allegations that an Orlando promoter coerced one of his boxers to lose a fight intentionally, then moved out of state to promote fights while still under investigation in Florida).

²¹ See *infra* notes 99–140 and accompanying text for a detailed history of attempts at federal intervention.

²² See The Professional Boxing Safety Act of 1996, 15 U.S.C. § 6301 (Supp. III 1997) (establishing certain minimum nationwide safety and regulatory standards in professional boxing). For more information about the Professional Boxing Safety Act, see *infra* notes 140–60 and accompanying text.

reluctance to intervene extensively within the industry.²³

Other major sports have had similar problems. For example, professional baseball players were without pension plans until after World War II.²⁴ Yet, the advent of the Major League Baseball Players' Association brought more equal bargaining power to players and allowed them to negotiate for greater rights within the industry.²⁵ Because of the National Labor Relations Board's (NLRB) decision in *American League of Professional Baseball Clubs v. NLRB*,²⁶ almost all team sports are now able to unionize under the National Labor Relations Act (NLRA).²⁷

However, in order to establish a union protected under the NLRA, professional boxers must be classified as employees under the statute.²⁸ While the NLRB has not yet determined the statutory employment status of professional boxers, a proper application of relevant agency principles²⁹ suggests that boxers meet the NLRA's employment requirement.

Part II of this Note will discuss the role of each of the administrative groups in professional boxing, the lack of a uniform governing body in the sport, and how these two factors combine to lead to exploitation of professional fighters. Part III will detail attempts at controversial federal regulation of the sport, leading

²³ See *infra* notes 129–38 and accompanying text (discussing the opposition to federal boxing regulation from both boxing insiders and federal legislators).

²⁴ See, e.g., JAMES EDWARD MILLER, *THE BASEBALL BUSINESS: PURSUING PENNANTS AND PROFITS IN BALTIMORE*, 13 (1990) (stating the first pension fund was developed for major league baseball players in 1949); MARVIN MILLER, *A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL* 39–58 (1991) (discussing baseball labor relations prior to unionization); Anthony Sica, *Baseball's Antitrust Exemption: Out of the Pennant Race Since 1972*, 7 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 295, 298–304 (discussing the history of employment relations in the major professional sports).

²⁵ See generally JOHN HELYAR, *LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL* (1994); JAMES EDWARD MILLER, *supra* note 24 (discussing the growth of unions and the subsequent power they brought professional athletes in bargaining with team owners); JON MORGAN, *GLORY FOR SALE: FANS, DOLLARS, AND THE NEW NFL* (1997).

²⁶ 180 N.L.R.B. 190 (1969) (concluding that professional baseball was an industry affecting commerce and thus the sport was within its jurisdiction).

²⁷ See Michael S. Hobel, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 *N.Y.U. L. REV.* 164, 169 n.11 (stating that since the NLRB's decision in *American League of Professional Baseball Clubs v. NLRB*, "[I]t has been clear that professional team sports are subject to the full coverage" of the NLRA).

²⁸ See *infra* notes 177–84 and accompanying text (discussing the requirements for a workers' group to unionize under the NLRA).

²⁹ Both the NLRB and reviewing courts use agency principles in determining whether workers wishing to unionize are considered employees for purposes of the NLRA. For further discussion of this topic, see *infra* notes 186–223 and accompanying text.

to the passage of the Professional Boxing Act of 1996.³⁰ It will then analyze how the statute does little in the way of adequately protecting fighters. Part IV will examine the requirements for unionizing under the NLRA, including the statute's employment requirement. After detailing the proper test for determining employee status, this Part will propose that a proper application of the test deems professional boxers employees under the NLRA, and thus subject to its protection. Finally, Part V will conclude that applying this standard will allow professional boxers to assure uniform safety regulations within the sport and financial security among the sport's participants without further federal legislation.

II. THE RELATIONSHIP OF BOXING'S MAJOR PARTIES

In order to detail the potential benefits unionization would bring to professional boxers, one must first understand the relationship between boxers and the individuals responsible for managing the sport. Section A will describe the duties of both boxing managers and promoters, as well as the often collusive relationship between the two. Section B will detail the authority of the private sanctioning bodies. Finally, Section C will analyze the role of the state athletic commissions as well as their inherent inability to regulate the sport effectively.

A. *Boxing Managers and Promoters*

A manager is the professional fighter's primary representative regarding all business dealings related to the sport.³¹ Typically, the manager is responsible for everything from selecting a promoter for the fighter³² and negotiating the terms of the promotional contract³³ to selecting appropriate trainers and cornermen.³⁴

³⁰ 15 U.S.C. §§ 6301–6313 (Supp. III 1997).

³¹ See, e.g., *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Walter Stone, counsel of the IBF) (detailing the representative powers of boxing managers); PHIL BERGER, *BLOOD SEASON: TYSON AND THE WORLD OF BOXING* 126–30, 241–45, 262–65 (1996) (detailing the control of Mike Tyson's career, including financial advice and public relations, by managers Bill Cayton and Jim Jacobs, until Tyson signed a promotional contract with Don King); see also generally THOMAS HAUSER, *THE BLACK LIGHTS* (1986) (detailing the relationship between manager Mike Jones's and boxer Billy Costello—in which Jones helped Costello choose cornermen, a fight promoter, a trainer; and represented Costello in day-to-day business dealings—as representative of a common boxer-manager relationship).

³² See BERGER, *supra* note 31, at 226–29 (discussing the process of selecting a promoter for Mike Tyson by comanagers Bill Cayton and Jim Jacobs); HAUSER, *supra* note 31, at 117–19 (discussing the fact that a manager selects a promoter for his fighter based on the financial compensation that the promoter may provide).

³³ See BERGER, *supra* note 31, at 117–19 (discussing the negotiation process of a promotional contract and the manager's role).

³⁴ See *id.* at 40–41 (detailing manager Mike Jones's assistance in selecting the appropriate

Because boxers rarely have the financial resources to cover training expenses when they begin their careers,³⁵ the fight manager pays the boxer's training expenses as well as provides the fighter a stipend on which to live.³⁶ In exchange for these services, a manager usually takes one-third of the boxer's purse.³⁷ This, along with the manager's other responsibilities and the fighter's duties to the manager, is contractually established.³⁸

Despite the responsibilities inherent in managing a boxer, state regulations on the licensing of managers differ drastically. In states where boxing is regulated more heavily, such as Nevada and New Jersey,³⁹ prospective managers are screened before being licensed. In other states, anyone who pays the licensing fee can become a manager.⁴⁰

trainer for fighter Billy Costello).

³⁵ See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel, boxing manager) (describing how "many . . . fighters are from underprivileged backgrounds . . ."); *The Professional Boxing Corporation Act of 1995: Hearings on H.R. 2212 Before the Comm. on Commerce, Trade, and Hazardous Materials*, 103d Cong. 41 (1996) (statement of Rep. Bill Richardson) ("Many of these athletes choose professional boxing to escape the poverty and crime that permeates their world."); JOHN SUGDEN, *BOXING AND SOCIETY* 52, 56-88 ("[B]oxing's cycle of exploitation is indeed vicious. It recruits the children of the urban poor—those whose life chances and educational opportunities and achievements are minimal."); *id.* (detailing examples of professional boxers in Hartford, Connecticut, who grew up in poverty and looked to boxing as an escape from the inner city as typical of athletes in the sport); Bill Barich, *Singin' the Blues*, *SPORTS ILLUSTRATED*, Dec. 9, 1996, at 70, 73 ("Professional boxing has always thrived in an atmosphere of . . . poverty . . ."); Mark Kriegel, *The Great (Almost) White Hope Boxer: Oscar DeLaHoya*, *ESQUIRE*, Nov. 1996, at 78, 82 ("Call it what it's been called before: Palookaville . . . where broken boxers live in poverty and chagrin.").

³⁶ See *Hearings on Business Practices in Boxing Before the Comm. on Consumer Affairs, Commerce, Science and Transp.*, 105th Cong. (1998), available in WESTLAW, U.S. Testimony [hereinafter *Hearings on Business Practices in Boxing*] (statement of Cedric Kushner, boxing promoter) (describing six-month investment of \$35,000 in training and living expenses for a local fighter that never produced any profit); BERGER, *supra* note 31, at 99 ("Tyson got \$500 for his first fight, a sum that [comanagers] Cayton and Jacobs anteed up because if they had relied on what the promoter could afford, their fighter would have ended up with pocket change."); HAUSER, *supra* note 31, at 40 (discussing manager Mike Jones's responsibility as a trainer to "provide adequate training" for his contracted fighter).

³⁷ See *Hearings on Business Practices in Boxing*, *supra* note 36 (presentation by Fredric G. Levin) (detailing the standard 33.3% "cut" the manager takes for his services).

³⁸ See HAUSER, *supra* note 31, at 40 (detailing the contract that manager Mike Jones and boxer Billy Costello signed); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 *HASTINGS L.J.* 459, 494 (1995) (detailing the fight contract between fighter Max Baer and his managers).

³⁹ See *infra* notes 82-83 and accompanying text (discussing the safety regulations of both Nevada and New Jersey).

⁴⁰ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Cedric Kushner) (discussing how he first became a New York State licensed boxing manager in 1982).

One of the most important tasks of the boxer's manager is to negotiate a contract on behalf of the boxer with a fight promoter.⁴¹ A promoter is responsible for arranging fights between boxers.⁴² The promotional contract typically pays the fighter a lump sum⁴³ upon signing, and it guarantees the promoter will attempt to arrange a minimum number of bouts per year⁴⁴ at a minimum purse for each bout.⁴⁵ This arrangement helps ensure that a fighter will have some level of income during the early stages of his career.⁴⁶ In exchange, the promoter usually receives the bulk of the profits associated with each bout—such as site fees, and, in larger contests, pay-per-view and broadcast rights.⁴⁷

by paying “approximately \$20 for the manager’s license . . . [A]ll I really was was a fan with a few extra dollars, with absolutely zero experience in the sport. I knew nothing in regards to being a competent boxing manager . . .”).

⁴¹ See HAUSER, *supra* note 31, at 117–18 (discussing managers’ importance in choosing a promoter); see also *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick C. English, counsel for Main Events, Inc.) (discussing the manager’s negotiation role with a promoter); *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel) (detailing the importance of a reputable manager in negotiating a contract with a promoter to protect the fighter’s interests).

⁴² See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin) (listing the responsibilities of a fight promoter); *id.* (statement of Patrick C. English) (detailing the responsibility of a promoter to arrange matches between various boxers).

⁴³ See *id.* (statement of Cedric Kushner) (discussing a signing bonus of \$100,000 to boxer Tony Tucker in the mid-1980s, as well as a subsequent signing bonus Tucker received upon agreeing to a contract with a new promoter three years later); RICHARD HOFFER, *A SAVAGE BUSINESS: THE COMEBACK AND COMEDOWN OF MIKE TYSON* 20 (1998) (detailing how Tyson received \$35 million “up front” for re-signing a promotional contract with Don King in 1995).

⁴⁴ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick English) (indicating that although the contract purports to guarantee the fighter a minimum number of fights each year, the promoter has a great deal of discretion in his attempts at arranging fights); see also *id.* (statement of Cedric Kushner) (discussing his general minimum bout-per-year provision); HAUSER, *supra* note 31, at 118 (detailing Don King’s promotional contract with boxer Billy Costello).

⁴⁵ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Cedric Kushner) (detailing the standard minimum purse-per-bout provision in a promotional contract); see *id.* (statement of Patrick C. English) (detailing the minimum-purse-per-bout provision used in the contracts of Main Events, Inc.); see HAUSER, *supra* note 31, at 118 (describing the minimum purse-per-bout provision boxer Billy Costello signed with promoter Don King).

⁴⁶ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick C. English) (discussing the effective use of minimum purse guarantees in giving a fighter a guaranteed income at early stages in his professional career); see *id.* (statement of Cedric Kushner) (detailing a promotional contract that provides a fighter with a minimum purse-per-fight that gives a fighter a specified income, regardless of the promoter’s profit); see also HAUSER, *supra* note 31, at 118–26 (discussing the financial guarantees the minimum purse-per-bout did—and did not—provide).

⁴⁷ See Lane, *supra* note 13, at 205 (detailing the profits of promoters Bob Arum and Don King from site promotion and pay-per-view fees); *Hearings on Business Practices in Boxing*,

Most promotional contracts are exclusive.⁴⁸ In other words, the fighter may only compete in fights arranged by the promoter with whom he has signed. This gives the promoter a great deal of power over the individual boxer's career, as the fighter cannot simply choose his opponents unilaterally;⁴⁹ instead, the promoter can implicitly veto an opponent he disapproves of by refusing to arrange the fight.⁵⁰

The exclusivity clause also serves to hinder a fighter's ability to progress in his career by preventing him from fighting higher-ranked opponents who have signed with rival promoters.⁵¹ Unless both promoters agree to co-promote the fight and divide the overall profits,⁵² the bout cannot be arranged. Because it is in

supra note 36 (statement of Fredric G. Levin):

The job of the promoter is to go out and get as much money as he possibly can get from television, from the site, from foreign rights, from sponsorships, etc., and then to pay the fighter as little as he possibly can. The reason for this is the difference goes to the promoter.

However, a few high-profile fighters are able to share in profits that typically go to promoters. *See Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick C. English) (stating that both Ray Leonard and Marvin Hagler had contracts that paid them 80–90% of the promotional profits from site fees, pay-per-view fees, and endorsements); Lane, *supra* note 13, at 206 (stating that both Evander Holyfield and George Foreman take a majority percentage of “promotional” profits from fights).

⁴⁸ *See Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick C. English) (detailing the exclusivity of promotional contracts); *id.* (statement of Cedric Kushner) (stating that his standard promotional contract, like other promoters, gives him exclusive rights to arrange his fighters' bouts); *id.* (statement of Fredric G. Levin) (detailing the standard provision in a promotional contract that grants a promoter the exclusive right to arrange bouts with the contracted boxer).

⁴⁹ *See id.* (statement of Cedric Kushner) (testifying that a clause in his promotional contract with Tony Tucker gave him the right to choose, with Tucker's input, Tucker's opponents).

⁵⁰ *See Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel) (detailing a promoter's veto power in choosing a boxer's opponents); *id.* (statement of Larry Hazzard, Chairman of the New Jersey State Athletic Control Board) (decrying a promoter's ability to veto a professional boxer's opponents); *Hearings on the Professional Boxing Safety Act: S. 1991 Before the Comm. on Commerce, Science, and Transp.* (Sept. 1994) [hereinafter *Hearings on Boxing Safety Act*] (statement of John H. Holladay, Jr., Chairman, South Carolina Athletic Commission) (detailing a promoter's control in choosing a boxer's opponents to boost a boxer's record).

⁵¹ *See* HAUSER, *supra* note 31, at 113 (quoting Don King in describing his contract with heavyweight boxer Greg Page, “[U]nless Greg Page can fight opponents who are under contract to [Don King Productions], his career will be at a standstill. And under [Don King Productions'] promotional contracts with top contenders, they cannot fight for any other promoter without . . . consent.”).

⁵² *See Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Cedric

the best interest of the individual promoter to keep as much of the profit as possible, a promoter is more likely to arrange a fight between two fighters under contract to him (and take all of the promotional profits) than to co-promote a bout (and split promotional profits), regardless of which opponent would better further the individual fighter's career.⁵³

This control encourages new boxers to sign with a promoter who holds contracts with a significant number of respected established boxers, thus giving the new fighter a larger pool of attractive potential opponents. However, this process also solidifies an individual promoter's hold over entire boxing weight divisions.⁵⁴ For example, if one particular promoter has contractual control over the champion and the top contenders in a particular weight class, a new boxer knows he will have to sign with that promoter in order to have the best chance to fight those contenders.⁵⁵ Thus, the new fighter signs a long-term contract with the promoter, giving the promoter contractual control over yet another prospective contender and further perpetuating the promoter's control over that weight division.

This contractual control usually lasts through the largest part of a boxer's career because of the long-term nature of the promotional contract. A promoter typically will sign a talented professional boxer to a three-year contract, with an option exercisable by the promoter for an additional two years if the fighter wins a major championship.⁵⁶ Because the average boxer's career is relatively short

Kushner) (discussing his co-promotion of fighters); *id.* (statement of Fredric G. Levin) (discussing the occasions when promoters must co-promote a fight); *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel) (discussing when it is economically viable for a promoter to co-promote as opposed to selecting another opponent whom he has under contract).

⁵³ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin) (discussing the tendency for promoters to match two fighters whom they have under contract, thus avoiding co-promotion).

⁵⁴ See BERGER, *supra* note 31, at 42 (detailing Don King's hold over fighters in the heavyweight division in the 1980s through ownership of the top contenders' contracts); HAUSER, *supra* note 31, at 112-14 (detailing both Don King's and Bob Arum's control over certain weight divisions).

⁵⁵ See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Roy Jones, Jr.) (describing the pressures a boxer faces in signing with a promoter in order to fight for a championship and detailing how he avoided signing with a promoter for several years while his career stagnated; Jones fought for the middleweight title within a year after signing with Top Rank, Inc.); *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin) (describing how a talented boxer under contract to a promoter without the appropriate connections within the sport may never challenge for a title).

⁵⁶ See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel) (detailing the use of the long-term contract). But see *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick C. English) (arguing that the proper use of a long-term contract can be ethical and, when combined with the good faith use of a minimum fight-per-year provision and a minimum purse-per-bout provision, can benefit both the boxer by

compared with the length of promotional option contracts,⁵⁷ a fighter may be locked into a contract with a promoter that lasts through the majority of his competitive career.⁵⁸

During this time, if the fighter has the opportunity to challenge a champion under contract to a different promoter, the challenger is usually required to sign an option contract with the current champion's promoter (who will then buy out the challenger's promoter).⁵⁹ The contract typically provides that if the challenger wins the title, the promoter holding the option has the right to arrange the new champion's future fights.⁶⁰ As an example, in order to fight heavyweight champion Mike Tyson in 1990, James "Buster" Douglas had to sign an option contract with Tyson's promoter Don King. When Douglas won the championship, it enacted a clause in the contract that made King his exclusive promoter for however long Douglas should keep the title, plus two years.⁶¹ Thus, Douglas had to fight under King for his entire reign as champion, whether it lasted ten days or ten years—plus an additional two years after that.

A final facet of the relationship between the manager and the promoter which potentially gives both parties an inequitable amount of power over the individual boxer, is the collusion that often exists in manager-promoter relations.⁶² Because a promoter negotiates with a boxer for a minimum compensation amount for each

providing guaranteed income, and the promoter by providing security on an investment that will likely lose money during the first part of the contract); *see also id.* (statement of Cedric Kushner) (detailing how the long-term contract is the only way a promoter can earn a profit on a fighter with whom he usually loses money early in the contract term).

⁵⁷ *See Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin) (stating that the long-term promotional contract, compared to the short professional career of the average fighter, often lasts for the prime earning years of a boxer's life in the sport).

⁵⁸ *See id.*; *cf. Hearing on Boxing Rules Revision*, *supra* note 12 (statement of Mike Tyson) (discussing how a professional fighter needs protection from promoters "eager to lock up a talented fighter by way of complex agreements that may last for many years").

⁵⁹ *See Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Cedric Kushner) (describing the use of option agreements between promoters); *id.* (statement of Roy Jones, Jr.) ("In order to get a Championship fight, you have just about got to give 'Options' to the Champion's promoter."); *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel) ("Can you imagine a scenario where the Utah Jazz would not be allowed to play the Chicago Bulls for the NBA Championship unless the owner of the Utah Jazz gave Jerry Reinsdorf ownership in his team? Never! But in boxing this is the ordinary course of business."). *But see id.* (statement of Walter Stone, General Counsel, IBF) (defending the use of the option contract as "good business practice[s]").

⁶⁰ *See, e.g., Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Cedric Kushner).

⁶¹ *See id.* (statement of Patrick C. English) (describing promotional contracts that, on the surface, may appear for a specified length, but, in practice, are open-ended, extending for the most valuable part of a professional fighter's career).

⁶² *See Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel).

fight and keeps the remaining profits, his interests conflict with those of the boxer and the manager (who technically represents the boxer's financial interests and takes a share in his purse).

However, in practice, a particular boxer's manager is often a business associate,⁶³ family member, or even employee of the boxer's promoter.⁶⁴ This calls into question the arm's length relationship that should exist between the parties negotiating the promotional contract.⁶⁵ As an example, many of the fighters under contract to Don King, one of the most powerful promoters in the sport, are managed by his stepson, Carl, an employee of Don King Productions.⁶⁶ This gives King not only inequitable bargaining power, but a stake through his son of the fighter's purse and leaves the boxer without a representative that is clearly supporting his interests. Thus, while the manager and the promoter represent divergent interests in theory, the line between the two has become increasingly blurred, with the promoter taking increasing control of the fighter's career.⁶⁷

B. *The Sanctioning Bodies*

Unlike other professional sports, boxing does not have a central organizing body that establishes rules, holds contests, and names champions. Instead, the

⁶³ See *Hearings on Business Practices in Boxing*, *supra* note 36 (letter from Dennis C. Vacco, Attorney General for the State of New York) (describing managers who have their fighters sign with promoters who are business associates of the manager).

⁶⁴ See *Hearings on Business Practices in Boxing*, *supra* note 36 (letter from Dennis C. Vacco); HAUSER, *supra* note 31, at 109–11 (describing the employment relationship between boxing managers and promoters).

⁶⁵ See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel) ("I know of instances where fighters' managers are mere instruments of the promoter and, so, there is no arm[']s length bargaining to protect the fighters' basic business interest.").

⁶⁶ See BERGER, *supra* note 31, at 42 ("In more than a few instances, [Don King's] stepson, Carl, was the manager of the same fighters that King promoted, a parlay that was well within the rules of the sport, but surely had the potential for exploitation."); HAUSER, *supra* note 31, at 109–12.

⁶⁷ See *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 58 (statement of Eddy Futch) ("[T]he line between the manager and the promoter has become so dim that it is hardly visible."); HAUSER, *supra* note 31, at 110 (detailing how on at least three occasions in the 1980s fights promoted by Don King took place in which his stepson, Carl, was the manager of both fighters). Summing up the situation, boxing journalist Michael Katz said, "[f]irst, the fighter signs a promotional contract with Don King. Then the manager signs over a piece of the boxer to Carl King. Finally the fighter gets a title bout. In this corner, a Don King fighter. In that corner, a Don King fighter. Guess who wins." *Id.* Cf. *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 93 (statement of John H. Hollady, Jr., Chairman of the South Carolina State Athletic Commission) ("Many promoters and managers take advantage of these boxers who are often uneducated. They are expecting help from the very people who are sacrificing them to the wolves for the fans.").

sport is overseen by a number of sanctioning agencies, each with different rules, weight classes, and champions.⁶⁸

Sanctioning agencies range from international organizations that name world champions to local governing bodies that associate their names with state or national titles.⁶⁹ However, regardless of the sanctioning organization, its main usefulness to the professional fighter is in the title bout it licenses.⁷⁰ For example, the three most prestigious sanctioning organizations—the World Boxing Council (WBC), the International Boxing Federation (IBF), and the World Boxing Association (WBA)—all recognize world champions at various weight classes.⁷¹ Because of the “prestige” of these organizations relative to other agencies, the championship titles of these organizations are more coveted than a “world championship” from another sanctioning body.⁷²

Indeed, the sanctioning bodies do little more than operate to perpetuate their world championship titles. The organizations exist solely to sanction their own title fights and elimination bouts that lead to title fights and to rank boxers who

⁶⁸ It has been argued that the prevalence of sanctioning agencies and their attendant champions, many of whom are not recognized as champions by the other sanctioning agencies dilutes the sport. See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Shelly Finkel) (“The proliferation of these sanctioning bodies has created literally hundreds of world titles in dozens of divisions. This is confusing to the public and generally dilutes the value of a ‘world title’ to the point where [the title] has become relatively insignificant.”); *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50 (statement of Eddy Futch) (stating that some of the champions recognized today would not be good enough to fight a preliminary bout in the 1950s when fewer champions were recognized). For example, in January 1999, the three major sanctioning bodies—the WBC, the WBA, and the IBF—recognized a total of sixty-eight world champions in eighteen different weight classes. See Darryl Howerton, *Boxing Special Report: A Bloody Mess?*, *SPORT*, Feb. 1999, at 46, 49 (discussing the number of champions whose names are not known to the general public). But see *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Walter Stone, counsel for the IBF) (“The proliferation of sanctioning organizations was a direct result of the greed of television, not of sanctioning organizations.”).

⁶⁹ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick C. English) (describing the variety and sweep of sanctioning bodies).

⁷⁰ See *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 53 (statement of Dr. Albert Capana) (describing the boxer as bowing to the sanctioning body because of the belt it holds); *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin) (stating that a boxer’s only interest in a sanctioning body is in the championship belts it authorizes).

⁷¹ See HAUSER, *supra* note 31, at 93–103 (detailing the authority and scope of the major sanctioning organizations).

⁷² See, e.g., Harry Mullan, *Tyson’s Return Brings Mixed Blessing*, *FIN. TIMES* (London), Dec. 31, 1998, at 12 (discussing Tyson’s consideration of fighting World Boxing Organization (WBO) heavyweight champion Herbie Hide: “Hide has potential, and could yet enter the big picture should Tyson decide that even a WBO belt is better than nothing.”).

may have an opportunity to fight for their title.⁷³ Thus, while each of the organizations has its own set of rules and safety standards for bouts it sanctions,⁷⁴ these rules only apply to title and elimination fights that the organizations oversee.

Yet, one of the most important features of a sanctioning body during a boxer's career is the organization's ranking system.⁷⁵ This system determines when the boxer may fight for a title if he is a contender, or against whom he will defend his title⁷⁶ if he is the champion. However, the sanctioning bodies follow no published objective criteria for determining a fighter's ranking.⁷⁷ This lack of disclosure or oversight allows organization administrators to manipulate the ranking systems to give preferred fighters a title shot, and, therefore, a bigger payday; or conversely, to allow a preferred, marketable champion to face lesser quality "number-one-ranked opponents" in order to hold his title longer.⁷⁸ This

⁷³ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin) (stating the purpose of the sanctioning bodies); *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Walter Stone, counsel for the IBF) (detailing the procedures of the IBF). In exchange for lending its endorsement to a title match, the organization receives a sanctioning fee which is typically 3% of the total purse and paid by each fighter. See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin). Once the boxer wins the organization's title, he agrees to compete in places, against opponents, and under the rules specified by the sanctioning organization. See *id.* (statement of Patrick C. English).

⁷⁴ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin) (criticizing the variety of rules between the sanctioning bodies).

⁷⁵ See S. REP. NO. 103-408, at 13 (1994) ("Ranking boxers is among the sanctioning bodies' most important functions. If a boxer is not ranked by a sanctioning body, the boxer has no chance of competing for that sanctioning body's title and is effectively denied the opportunity for the substantial earnings that can come with a title bout.").

⁷⁶ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick English) (stating that each of the organizations has rules mandating defenses against the number-one-ranked challengers, but these rules are enforced sporadically, depending on the whims of the organizations' councils); HAUSER, *supra* note 31, at 99 (quoting former New York Times boxing columnist Michael Katz, "WBC rules are like the Soviet Constitution. They only work on paper," and promoter Bob Arum, "The [WBC] rules are an ever-changing series of directives that apply to certain people and certain entities at different times and not to others.").

⁷⁷ See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Sen. John McCain) ("The sanctioning organizations comprise a byzantine and largely arbitrary system of rating fighters that is not primarily on their skills and successes in the ring."). But see *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Walter Stone, counsel for the IBF) (defending the lack of objective ranking criteria between the different sanctioning bodies as a result of the differing goals of each sanctioning organization).

⁷⁸ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick C. English) (describing the breakdown of the ranking system allowing champions to avoid worthy contenders by fighting a series of "bums" who are ranked as mandatory challengers). For example, one insider noted:

argument is bolstered by allegations that certain powerful promoters within the sport hold influence with particular sanctioning agencies, agreeing to funnel their marketable fighters into bouts authorized by that sanctioning agency in exchange for preferential treatment for their entire stable of fighters.⁷⁹ Thus, the fighter's career path continues to be controlled by the promoter, through the promoter's influence within the sanctioning organizations.

C. The State Regulatory Agencies

Before 1996, the only governmental regulation of boxing was at the state level.⁸⁰ Because of this, protection of fighters varied widely, depending upon the state in which they fought.⁸¹ States such as Nevada and New Jersey had extensive regulations governing the sport,⁸² mandating medical exams for fighters before

Advancement in boxing is arbitrary and capricious. . . . [I]n boxing a handful of men—too many of them corrupt—determine who fights, and fighters do their best to avoid opponents who can beat them. . . . The professional worlds of tennis and golf would never tolerate such a situation. But . . . it's clear that boxing's major sanctioning bodies often operate in precisely that manner.

BERGER, *supra* note 31, at 94.

⁷⁹ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Fredric G. Levin) (stating that, "[o]ver the years, it has been documented that different promoters control different organizations," and describing the preferential treatment sanctioning agencies give promoters); BERGER, *supra* note 31, at 230–35 (detailing Don King's influence with the WBC and Bob Arum's influence with the IBF). But see HAUSER, *supra* note 31, at 97 (stating the opinion among many observers that Don King does not exert improper influence over the WBC, contrary to popular belief).

⁸⁰ The Professional Boxing Safety Act of 1996 imposed minimum federal guidelines on the sport. For a detailed discussion of this statute, see *infra* notes 141–60 and accompanying text.

⁸¹ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Patrick C. English) ("Imagine a major professional sport where the rules change as the participants cross state lines. . . . It is obvious that a professional sport cannot run that way—and yet this is precisely the way boxing is . . . run."); *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 26 (statement of Al Bernstein, professional sports broadcaster) (detailing the fact that boxing rules differ widely from state to state).

⁸² See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Larry Hazzard, New Jersey Athletic Control Board Comm'r) (discussing New Jersey boxing regulations that include multiple medical evaluations to license boxers, five-year limits on boxer promotional contracts, and prohibition of boxer-manager contractual options); *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 59 (statement of Dr. Flip Homansky) (discussing the evaluative role a ringside physician in Nevada plays in determining whether to stop a fight); *id.* at 42 (statement of Jerome Coffee, member, Nevada State Athletic Commission) (discussing the drug testing procedures used in Nevada before and after a fight); *id.* at 45 (statement of Dr. Albert Capanna) (stating the medical certification requirements of a

each bout, requiring paramedics and licensed physicians to be present at ringside during fights, and providing for license suspensions for boxers considered medically unable to fight.⁸³ By contrast, other states had no regulations.⁸⁴ Medical personnel were not required to be present during the bout, nor was a fighter required to submit to a pre-fight medical examination. In other words, it was as easy to obtain permission to box—with all of its attendant risks of injury—as it was to go fly-fishing.

Between these two extremes lay the majority of states—jurisdictions that had agency regulations that provided differing levels of protection and registration.⁸⁵ Yet, these states often did not employ personnel who were knowledgeable in the sport,⁸⁶ thus leaving many of the regulations unenforced.⁸⁷

This diversity of regulations and varying degrees of regulatory enforcement from state to state allowed boxers and promoters to fight in jurisdictions that were most advantageous to them, regardless of safety concerns.⁸⁸ For example, if a fighter had been knocked out on January 1 while in Nevada, he would be medically prohibited from fighting within the state for at least thirty days.⁸⁹ However, the fighter may simply go to North Dakota instead and fight on January 3, even though he continued to suffer the effects of his knockout two days earlier. The Professional Boxing Safety Act partially solves this problem by requiring that each state honor the medical suspensions issued by another state.⁹⁰ However, a fighter could continue to fight in states with the least stringent medical certification procedures, thus ensuring that he is never suspended in the first place. Additionally, while all states are required to administer bouts under some level of

boxer in Nevada are more stringent than in most other states).

⁸³ See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Larry Hazzard, New Jersey Athletic Control Board Comm'r); *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 59 (statement of Dr. Flip Homansky); *id.* at 45 (statement of Dr. Albert Capanna).

⁸⁴ See S. REP. NO. 103-408, at 4 (1994) ("There is no governmental regulation of boxing in Colorado, South Dakota, and Wyoming, although boxing is not illegal in those states.").

⁸⁵ See *id.* at 5; see also *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 21 (statement of Al Bernstein, professional sports broadcaster).

⁸⁶ See *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 45 (statement of Albert Capanna) (stating the lack of enforced regulations in many states); *id.* at 56 (statement of Eddy Futch) (detailing his attempts to bring venues in North Dakota "up to [the state's] standards").

⁸⁷ See *id.*; S. REP. NO. 103-408, at 4 (1994).

⁸⁸ See *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 21 (statement of Al Bernstein, professional sports broadcaster).

⁸⁹ See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Larry Hazzard, New Jersey Athletic Control Board Comm'r).

⁹⁰ *Cf. infra* notes 144-52 and accompanying text.

regulation, regulatory enforcement remains lax in many jurisdictions.⁹¹

The variety of state regulations also applies to the licensing of boxing managers and promoters.⁹² Some states require background checks and commission approval before licensing managers and promoters, while others continue to require that prospective managers and promoters merely pay a fee in order to operate within the state.⁹³ In addition, there is no national registration system for boxing managers and promoters, allowing unscrupulous managers or promoters under investigation in one state to continue to operate in other jurisdictions.⁹⁴ In 1994 for example, Rick Parker had his promoter's license revoked by the Florida State Athletic Commission after allegations that he "fixed fights" with two of his boxers.⁹⁵ While still under investigation, Parker was allowed to promote fights in other jurisdictions.⁹⁶ Thus, he was able to continue arranging fights for his boxers although he was suspected of criminal fraud.

⁹¹ See *supra* note 86.

⁹² See, e.g., *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Cedric Kushner); *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 21 (statement of Al Bernstein, professional sports broadcaster).

⁹³ See *Hearings on Business Practices in Boxing*, *supra* note 36 (statement of Cedric Kushner) (stating that he merely had to pay a fee to first become licensed as a promoter). While New York has since increased its licensing requirements, Kushner stated other states continue to require that promoters pay a fee as the sole restriction to licensing. *Id.* See also S. REP. NO. 103-408, at 5-6 (1994). The Report describes licensing as follows:

[L]icensing of other boxing participants such as managers, matchmakers and cornermen, is generally automatic in most states subject to the payment of the required licensing fee. Citing lack of staff and resources, state boxing regulators generally do not inquire into either the experience or backgrounds of applicants for boxing licenses.

Id.

⁹⁴ See *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50 (statement of Sen. John McCain).

⁹⁵ See, e.g., Gerard Shields & Barry Cooper, *FBI Investigates Boxing Promoter*, THE ORLANDO SENTINEL, May 15, 1994, at C1 (recounting allegations that Parker coerced a fighter under contract to lose intentionally, and the FBI's subsequent investigation); Gerard Shields & Barry Cooper, *Third Fighter Accuses Parker of Fight-Fixing*, THE ORLANDO SENTINEL, Apr. 3, 1994, at D1 (detailing accusations by boxer Terry Davis that Parker attempted to coerce him into "throwing" a fight against Riddick Bowe).

⁹⁶ See *Hearings on the Health and Safety of Professional Boxing*, *supra* note 50, at 4 (statement of Sen. John McCain). Senator McCain stated:

The recent situation in Florida . . . [regarding Parker] is a disturbing example of the unethical and often illegal practices that are rampant in the professional boxing industry today. I find it astounding that this individual is apparently being allowed by several other States to play an active role in professional boxing.

Id.

III. A HISTORY OF ATTEMPTS AT FEDERAL GOVERNMENT INTERVENTION

Because of the problems inherent within the sport, Congress has considered regulating professional boxing several times over the past forty years. However, due to the controversial nature of regulating a private athletic industry,⁹⁷ little meaningful headway has been made. Indeed, it took thirty-six years from the first series of investigations into the sport for Congress to enact a law requiring all states to institute some level of boxing safety guidelines.⁹⁸ Section A of this Part will detail the history of attempts at regulation of the sport from the 1960s through the passage of the Professional Boxing Safety Act of 1996 and its subsequent proposed amendments. Section B will then analyze the Act and detail the weaknesses that keep it from adequately protecting professional fighters.

A. Proposed Regulation

Although the majority of proposed federal boxing legislation has focused on safety issues, allegations of corrupt practices within the sport have sparked most congressional inquiries into the subject. Congress first considered regulating boxing in 1960, when Tennessee Senator Estes Kefauver called hearings on reforming the industry.⁹⁹ Kefauver, the Chair of the Senate Subcommittee on Antitrust and Monopoly, ordered the hearings as a result of allegations of Mafia ties and claims of fight-fixing by heavyweight world champion Sonny Liston.¹⁰⁰

As a result, Kefauver sponsored legislation calling for the Justice Department to form a federal boxing commission.¹⁰¹ However, his efforts were thwarted by Attorney General Robert Kennedy, who believed that the federal government should not intervene in the sport.¹⁰² Nonetheless, many observers continued to believe that the sport needed some kind of outside regulation in order to survive. For example, former heavyweight champion Jack Dempsey, who testified before Kefauver's investigation, stated, "The fight game is just about on the way out. . . . [I]t's ready to be buried if something isn't done, and fast."¹⁰³

Questions over potential fight-fixing also launched the first inquiries of the

⁹⁷ See *infra* notes 130–40 and accompanying text.

⁹⁸ See *infra* notes 141–60 and accompanying text for a discussion of the Professional Boxing Safety Act of 1996.

⁹⁹ See *Professional Boxing: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 86th Cong. (1960); see also Howard, *supra* note 9, at 108–11 (providing an additional analysis of the Kefauver investigations and federal attempts at boxing regulation); Peter E. Millspaugh, *The Federal Regulation of Professional Boxing: Will Congress Answer the Bell?*, 19 SETON HALL LEGIS. J. 33, 33–46 (1994).

¹⁰⁰ See THE RING, *supra* note 12, at 134.

¹⁰¹ See *id.*; see also S. REP. NO. 103-408, at 18 (1994).

¹⁰² See THE RING, *supra* note 12, at 134.

¹⁰³ *Id.*

1990s into federal boxing reform. In 1992, Delaware Senator William Roth ordered an inquiry into the sport after a February world title fight between middleweight champion James Toney and journeyman David Tiberi.¹⁰⁴ Although most ringside experts believed that Tiberi had won the fight handily,¹⁰⁵ the judges awarded a split decision to Toney.¹⁰⁶ During the investigation, and in a suit filed against promoter Bob Arum and the IBF (the promoter and sanctioning body of the bout respectively),¹⁰⁷ Tiberi stated that the IBF "fixes fights so the . . . champion will retain his title in order to increase popular interest in the current champion, which in turn increases the profitability of fights involving that champion."¹⁰⁸ While the investigation failed to prove conclusively that the IBF was involved in fight fixing,¹⁰⁹ it found that two of the three judges in the New Jersey fight were unlicensed in the state and unfamiliar with the state's scoring practices.¹¹⁰

The investigations continued after another controversial bout in September 1993 between Julio Caesar Chavez and Pernell Whitaker.¹¹¹ After questioning 130 members of the boxing industry, the Senate Subcommittee found that too much control by promoters and sanctioning bodies, combined with too little protection from state regulatory agencies, placed fighters in physical danger within the ring and increased their susceptibility to managerial abuse outside the ring.¹¹²

As a result of these investigations, Senator Roth introduced the Professional

¹⁰⁴ See 138 CONG. REC. S5658, S5658 (daily ed. Apr. 28, 1992) (statement of Sen. Roth); see also Howard, *supra* note 9, at 109.

¹⁰⁵ See 141 CONG. REC. S16513, S16513 (daily ed. Nov. 1, 1995). Announcer Alex Wallau, commenting on the fight for ABC, described the result as the "most disgusting decision I have ever seen." *Id.* at S16513. Shortly after the fight itself, Donald Trump, owner of the Trump Taj Mahal Casino Resort where the fight was held, said, "I've watched a lot of bad decisions over the years, but this one was the worst, and I'm tired of it. There will be no more fights in Atlantic City until this situation is rectified." See Bob Mutter, *Judge Lerch Taking Heat in Toney-Tiberi Rhubarb*, CHICAGO SUN-TIMES, Feb. 28, 1992, at 93.

¹⁰⁶ See Mutter, *supra* note 105, at 93.

¹⁰⁷ See *Kondrath v. Arum*, 881 F. Supp. 925, 927 (Del. 1995) (ruling that plaintiff's suit alleging violations of both federal and state racketeering statutes, as well as fraud and breach of fiduciary duties, be transferred to state court).

¹⁰⁸ *Id.* at 927.

¹⁰⁹ See S. REP. NO. 103-408, at 25 (1994). The investigation did show that boxing promoter Al Certo had ties with the Genovese crime family. However, there was no direct proof that any Mafia influence was exerted on the fight itself. *Id.* at 28.

¹¹⁰ See *id.* at 29.

¹¹¹ See 139 CONG. REC. S13129, S13129 (daily ed. Oct. 6, 1993). The fight was ruled a draw, despite the opinion of most observers that Whitaker dominated the fight.

¹¹² See *id.* at S13129 ("Our investigation revealed that the current regulatory system is no better at protecting a boxer's health and safety than it is in protecting the sport from unfairness.").

Boxing Corporation Act of 1993.¹¹³ Under the bill, a self-funded government corporation known as the Professional Boxing Corporation (PBC) would regulate boxing nationwide. The executive board of this Corporation would have authority to license all boxing personnel and events, and to register boxers, fight physicians, promoters, and managers.¹¹⁴ The bill also empowered the PBC to prohibit fights that violated its minimum standards¹¹⁵ as well as to review the role of the private sanctioning bodies in the sport.¹¹⁶ The bill, like later attempts at federal boxing legislation, was controversial, with both legislators and members of the sport divided on its merits.¹¹⁷

The Professional Boxing Corporation Act, and much of the similar legislation that followed, were doomed to congressional inaction, legislative compromise, and outside opposition. Congress took no action on the boxing corporation proposal, killing the bill.¹¹⁸ The next year, the Professional Boxing Safety Act of 1994¹¹⁹ was introduced by New Mexico Congressman Bill Richardson as a compromise between those people that favored full-scale boxing regulation and those that were against federal intervention.¹²⁰ The bill provided for the same broad safety measures as the original Professional Boxing Corporation Act, without the use of a federal government corporation and its associated expenses.¹²¹

This new registry for professional fighters operated through a federal clearinghouse.¹²² Fighters would be issued licenses in the form of identification cards that they would be required to show at the weigh-in before each fight in

¹¹³ S. 1189, 103d Cong. (1993). The bill was also introduced in the House by New Mexico Congressman Bill Richardson. See H.R. 2607, 103d Cong. (1993).

¹¹⁴ See Professional Boxing Corporation Act, S. 1189, 103rd Cong., § 8 (1993).

¹¹⁵ See *id.* § 8(h)(5).

¹¹⁶ See *id.* § 8(d)(5)(B)(10).

¹¹⁷ See Richard O'Brien, *A New Urgency*, SPORTS ILLUSTRATED, Apr. 5, 1993, at 11, 11 (detailing the Roth investigation and support of the reform legislation by stating, "boxing's lawlessness merit[s] closer scrutiny by Washington"); Bill Richardson, *With Federal Regulation Dispute Never Would Have Happened*, USA TODAY, Mar. 21, 1991, at 11C (arguing in support of the bill). But see Joseph Deitch, *Larry Hazzard; Commissioner Keeps His Eye on Boxing*, N.Y. TIMES, Oct. 23, 1993, at 13NJ, 3 (New Jersey State Boxing Commissioner Larry Hazzard, who expressed concern over the possibility that federal legislators who are not knowledgeable about boxing might overregulate).

¹¹⁸ See *Professional Boxing Corporation Act of 1993*, available in LEXIS, LEGIS Library, B1t103 File.

¹¹⁹ See generally Professional Boxing Safety Act of 1994, S. 991, 103d Cong. (1994).

¹²⁰ See Howard, *supra* note 9, at 111 (1997). See also Marcus Hayes, *Punch Drunk: Reform Slow in Coming in the U.S.*, HOUSTON CHRON., Feb. 18, 1996, at 10 (describing the Professional Boxing Safety Act of 1994 as a "toothless version" of the Professional Boxing Corporation Act).

¹²¹ See Howard, *supra* note 9, at 111.

¹²² See Professional Boxing Safety Act of 1994, S. 991, 103d Cong. § 7 (1994).

which they were involved.¹²³ State boxing commissions would then be required to report the results of these bouts, along with any subsequent fighter suspensions, within forty-eight hours.¹²⁴ In most cases, each state would then be required to honor the license suspensions issued by another state.¹²⁵

After this bill failed to reach a congressional vote,¹²⁶ Senator McCain introduced identical legislation—The Professional Boxing Safety Act of 1995¹²⁷—the following year. Again, the bill died, only to be replaced by an identical bill in 1996.

In addition to legislative inaction¹²⁸ and division in Congress over how severely the sport should be regulated,¹²⁹ resistance among boxing insiders has slowed movements to federal reform.¹³⁰ Indeed, the most ardent critics of federal boxing regulation are among the sport's most powerful administrators: the heads of the sport's sanctioning bodies and boxing promoters.¹³¹ Although refusing to testify before Congress on the matter,¹³² promoter Don King has said that federal regulation of boxing would deprive the sport of an open economic market. According to King, "Boxing is the poorest of all sports. . . . Once federal regulation would come into boxing, people like myself would never have an opportunity to be part of the boxing hierarchy." ¹³³

Another sanctioning body administrator, Bob Lee, President of the IBF, came out against federal regulation of the sport while testifying before Congress in its

¹²³ See *id.* § 5(b).

¹²⁴ See *id.* § 7(a).

¹²⁵ See *id.* § 6(2)(D). An exception existed for certain administrative suspensions in which the fighter obtained prior approval from the suspending state before fighting in another state. See *id.* § 6(2)–(3).

¹²⁶ See *Professional Boxing Corporation Act of 1993*, available in LEXIS, LEGIS Library, B1t103 File.

¹²⁷ S. 187, 104th Cong. (1995).

¹²⁸ Certainly another reason is the fact that Congress has only a finite legislation period, and regulating boxing may come low on the list of issues to consider. Or, as boxing manager Al Certo said before testifying, "Drugs are the problem. AIDS is the problem. Who gives a — about boxing?" See O'Brien, *supra* note 117, at 11.

¹²⁹ See Bob Brubaker, *Controversy Stirs Call for Legislation: New Mexico's Richardson Seeks to Regulate Boxing*, WASH. POST, Feb. 14, 1990, at C3 (quoting New Mexico Congressman Bill Richardson as saying, "In the past, there's been opposition from a Republican administration saying we don't need anymore regulation. . . . The opposition has said that since other professional sports aren't regulated, boxing shouldn't be either."); Millspaugh, *supra* note 99, at 63–67.

¹³⁰ See, e.g., *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Walter Stone, counsel for the IBF).

¹³¹ For a more detailed description of the role of promoters and sanctioning agencies within the sport, see *supra* notes 41–79 and accompanying text.

¹³² See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Sen. McCain).

¹³³ See Brubaker, *supra* note 129, at C3.

investigation of the 1992 Toney-Tiberi fight.¹³⁴ While Lee—whose organization sanctioned the fight and picked its judges—pleaded the Fifth Amendment on any questions specific to the bout itself,¹³⁵ he stated that he felt calls for regulation due to bad decisions within the sport were unjustified. According to Lee, “Boxing has become the whipping boy in sports. A bad call in football or baseball can be made and no one talks about fixes, but in this sport, they seem to feel that anything that happens is a result of shenanigans.”¹³⁶

Even those insiders who favor federal boxing regulation have expressed worries about the government becoming too involved in a sport in which it knows relatively little. Larry Hazzard, the Chairman of the New Jersey State Athletic Control Board, has stated that while he favored some form of federal regulation, “[w]hat we don’t need is a politician who doesn’t know a left hook from a fish hook to sit up there and dictate to knowledgeable boxing people.”¹³⁷

Despite this controversy, in 1997, with the support of the AFL-CIO and the National Football League Player’s Association,¹³⁸ Congress passed The Professional Boxing Safety Act.¹³⁹ While hailed by its supporters as a “solid first step”¹⁴⁰ in providing safer boxing conditions, it fails to give fighters an appropriate level of either physical safety within the ring or financial security outside of it.

B. *An Analysis of The Professional Boxing Safety Act of 1996*

While the Professional Boxing Safety Act (the Act) is an effective effort in establishing nationwide minimum standards for the sport, the Act fails to protect boxers from exploitation at the hands of managers and promoters or to issue a uniform level of applicable safety regulations. Thus, fighters continue to be left unprotected both inside and outside the ring, during and after their careers.

First, although the Act’s primary goal is to render the sport itself physically safer for fighters,¹⁴¹ the statute establishes only the bare minimum in the way of

¹³⁴ See 138 CONG. REC. S5658, S5660 (daily ed. Apr. 28, 1992).

¹³⁵ See Ron Borges, *Boxing’s Black Eye: A Rash of Scandals and Chaos Have Left the Sport Reeling*, BOSTON GLOBE, Oct. 31, 1993, at 65.

¹³⁶ *Id.*

¹³⁷ Deitch, *supra* note 117, at 3.

¹³⁸ See *Committee to Organize Professional Boxing in the U.S. Federation of Professional Athletes (AFL-CIO)* (visited Oct. 25, 1999) <<http://www.uhu.com/boxing/union.htm>>.

¹³⁹ 15 U.S.C. Chapter 89 (Supp. III 1997).

¹⁴⁰ See *Committee to Organize Professional Boxing in the U.S. Federation of Professional Athletes (AFL-CIO)* (visited Oct. 25, 1999) <<http://www.uhu.com/boxing/union.htm>>.

¹⁴¹ See 15 U.S.C. § 6302 (Supp. III 1997) (describing the first purpose of the statute as improving “the system of safety precautions that protects the welfare of professional boxers”).

uniform safety regulations. Thus, the Act requires only that: (1) a licensed physician certify that the boxer is fit to compete; (2) an ambulance or paramedics with resuscitation equipment be present at each fight; (3) a physician be present at ringside; and (4) each participating boxer carry health insurance.¹⁴² The Act makes no reference to the maximum length of a fight, the maximum or minimum weight of boxing gloves or other equipment, all of which have been shown to have an impact on fighter safety.¹⁴³ In these areas, states and sanctioning agencies are free to legislate (or not) at their discretion. Indeed, the Act's requirement of an ambulance or medical personnel with resuscitative equipment is phrased only as a default rule. A state need not meet this requirement if its boxing commission expressly rules that the equipment is not necessary.¹⁴⁴

The Act also places some measure of administration in states that do not have boxing regulations. According to the Act, these states must allow another jurisdiction's boxing commission to supervise any bouts the non-regulated state holds.¹⁴⁵ However, this allows promoters to "shop" for the most preferable state commission, as a promoter wishing to hold a bout in a state without a boxing commission—Colorado, for example¹⁴⁶—may merely request that a state with the most lax regulations supervise the bout. While this requirement at least establishes some sort of governmental supervision, it still leaves open the possibility for abuse at the hands of promoters and managers.

Finally, the Act requires all boxers wishing to fight in the United States to register and receive a photo identification card.¹⁴⁷ The results of all of a given fighter's bouts, as well as information regarding medical and administrative suspensions, are then required to be reported to the national clearinghouse.¹⁴⁸ This photo registration prevents fighters who were placed on medical suspension by one state from fighting under an alias in another state. However, fighters suspended for other reasons may continue to box in other states because the law requires jurisdictions to honor only the medical suspension of a reporting state.¹⁴⁹

¹⁴² See 15 U.S.C. § 6304 (Supp. III 1997).

¹⁴³ See, e.g., Soren Schmidt-Olsen et al., *Amateur Boxing in Denmark, The Effect of Some Preventative Measures*, 18 THE AM. J. OF SPORTS MEDICINE, 98, 98 (1990); Kevin Walsh, *Boxing: Regulating a Health Hazard*, 11 J. CONTEMP. HEALTH L. & POL'Y 63, 70–75 (discussing the applicability of various safety measures).

¹⁴⁴ See 15 U.S.C. § 6304(2) (Supp. III 1997) (requiring an ambulance or paramedics with resuscitating equipment unless "otherwise expressly provided under regulation of a boxing commission promulgated subsequent to" the enactment of this Act).

¹⁴⁵ See 15 U.S.C. § 6303 (Supp. III 1997) ("No person may arrange, promote, organize, produce, or fight in a professional boxing match held in a State that does not have a boxing commission unless the match is supervised by a boxing commission from another State . . .").

¹⁴⁶ See *supra* notes 81–84 and accompanying text.

¹⁴⁷ See 15 U.S.C. § 6305 (Supp. III 1997).

¹⁴⁸ See *id.* § 6307.

¹⁴⁹ See *id.* § 6306(a)(2).

Indeed, the weakness of this section of the Act was most glaringly exposed after Mike Tyson was indefinitely suspended by the Nevada State Athletic Commission when Tyson bit IBF heavyweight champion Evander Holyfield's ear in a 1997 bout.¹⁵⁰ While still under the Nevada-imposed license revocation, Tyson applied to the New Jersey State Athletic Commission¹⁵¹ for a license to fight in that state. In theory, Tyson, who was being disciplined for his conduct in Nevada, could still fight anywhere else. However, complete exposure of the weakness of this part of the Act was averted when Tyson withdrew his New Jersey application and instead re-applied in Nevada.¹⁵²

Despite the weaknesses of what is specifically provided in the Act, it is what the Act does not include that continues to allow exploitation. First, although the Act requires national licensing and reporting of boxers themselves, it places no such demands on promoters, managers, or trainers. Therefore, a promoter who has had his license revoked in one state for fight fixing may still promote fights in another state; and a manager investigated by a state's Attorney General's office for embezzlement of his fighter's pay may continue to manage boxers throughout the rest of the country.¹⁵³ This lack of any national licensing or registration system for the promotional and managerial personnel of the sport continues to leave fighters open to financial abuse.

The Act also makes no provision for the funding of a pension plan for retired boxers.¹⁵⁴ A pension plan is a necessary financial option because most of the nation's 5,000 career boxers are "journeymen"—fighters who earn, on average, less than \$20,000 a year during their short careers.¹⁵⁵ Unlike other professional sports, whose leagues have established pension funds for their ex-athletes,¹⁵⁶ most retired fighters have no such financial option because of the sport's current

¹⁵⁰ See Jack Thompson, *Tyson Expects Lifetime Ban in Wake of Holyfield Fight*, CHIC. TRIB., Nov. 4, 1997, at 2.

¹⁵¹ See Royce Feour, *Bill Would End Fight Loophole*, LAS VEGAS REVIEW-JOURNAL, Oct. 3, 1998, at C4. This has become commonly known as the "Mike Tyson loophole" in which a fighter who has had his license revoked for nonmedical reasons can nonetheless apply for a license in another state without receiving the revoking state's permission. *Id.* at C4. The Muhammad Ali Boxing Reform Act proposed in 1998 would have closed this loophole. See S. 2238, 105th Cong. § 5 (1998).

¹⁵² See Timothy W. Smith, *Lack of Closure After Tyson Hearing Frustrates New Jersey's Commissioner*, N.Y. TIMES, Aug. 15, 1998, at C7.

¹⁵³ See *supra* notes 94–96 and accompanying text.

¹⁵⁴ The Act does provide for a feasibility study for a pension plan, but no action has been taken on funding a plan. See 15 U.S.C. § 6311(a) (Supp. III 1997).

¹⁵⁵ See Lane, *supra* note 13, at 204.

¹⁵⁶ See Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1152 (1982) (discussing the owner-player compromise on league pension structure); Laurence B. Wohl, *Fiduciary Duties Under ERISA: A Tale of Multiple Loyalties*, 20 U. DAYTON L. REV. 43, 84 n.172 (1994) (discussing the National Football League's player pension program).

structure.

Finally, the Act makes no effort to regulate the “alphabet soup”¹⁵⁷ sanctioning bodies that govern the sport. Because of this, sanctioning agencies such as the WBC, WBA, and IBF continue to have free reign to rank fighters as they see fit—giving fighters under contract with promoters allied to a sanctioning body opportunities at title fights and lucrative paydays, while boxers who refuse to contract with an allied promoter are relegated to less lucrative fights. This unregulated system perpetuates the lack of financial security a fighter has during his career because he must always be mindful to associate with the “right” promoter.¹⁵⁸

Thus, while the Act establishes nationwide minimum standards of safety, it still fails to provide for a professional fighter’s financial security or to give a fighter an equitable bargaining position within the sport. Because of these weaknesses, it is not surprising that one of the senators, John McCain, who initially started the movement toward federal boxing reform, stated that he felt the Act did not go far enough in protecting the interests of fighters.¹⁵⁹ Indeed, in 1998, McCain introduced the Muhammad Ali Boxing Reform Act¹⁶⁰ to attempt to establish further financial safeguards for professional boxers. However, like every boxing statute except the Professional Boxing Safety Act, the bill died in Congress.

IV. UNIONIZATION UNDER THE NATIONAL LABOR RELATIONS ACT: AN ALTERNATIVE TO FURTHER FEDERAL REGULATION

In response to a question about the possibility of the federal government regulating boxing, Don King said, “If they are going to regulate boxing they

¹⁵⁷ See 138 CONG. REC. S5658, S5663 (1992) (report presented by Sen. Roth referring to the variety of boxing sanctioning bodies known largely by their initials).

¹⁵⁸ See *supra* notes 41–50 and accompanying text.

¹⁵⁹ See Howard, *supra* note 9, at 114.

¹⁶⁰ *The Muhammad Ali Boxing Reform Act*, S. 2238, 105th Cong. (1998). Indeed, partly as a result of a controversial decision in a March 1999 heavyweight championship fight between Evander Holyfield and Lennox Lewis, McCain introduced the 1999 version of the Muhammad Ali Boxing Reform Act. See S. 305 106th Cong. (1999). This newest proposed legislation goes farther in protecting a fighter than the statute currently in effect. For example, the bill establishes a one-year limit on promotional contracts, *see id.* § 15(a)(2)(1), restricts conflicts of interest between promoters and managers, *id.* § 15(b), and mandates the public disclosure of a sanctioning organization’s ratings criteria, *id.* § 16(d). However, while the Senate version of the legislation passed, the House version, H.R. 1832, 106th Cong. (1999), was still pending before the Commerce Committee as of September 24, 1999. In light of the history of attempts at similar legislation, it remains to be seen whether this most recent attempt to regulate the industry will have any success.

should have to regulate football, baseball, hockey and basketball.”¹⁶¹ This sums up the primary argument proffered by opponents of boxing regulation: no other American sport is regulated at the federal level, so boxing should not be treated differently.¹⁶² Conversely, supporters of federal regulation, such as Senator John McCain and Congressman Bill Richardson, argue that current regulation is insufficient considering the nature of the sport.¹⁶³ The structure of boxing—with no uniform governing body—is so different from other major sports that it is necessary to regulate it in order to protect individual fighters’ interests.¹⁶⁴ However, both parties neglect another major difference between boxing and other major American professional sports: boxing does not have a union that is empowered under the National Labor Relations Act (NLRA) to bargain on behalf of its members.¹⁶⁵

Indeed, before unionization, team sports such as professional baseball had problems similar to those of professional boxing.¹⁶⁶ Players had no pension nor retirement plans,¹⁶⁷ were restricted in their professional movement from one team to another,¹⁶⁸ and faced less than ideal working conditions while being financially exploited by owners. Like workers in other industries, unionization of

¹⁶¹ See Brubaker, *supra* note 129, at C3 (expressing the view that regulating professional boxing without regulating other sports is inequitable).

¹⁶² See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Walter Stone, counsel for the IBF) (arguing that no other sport is regulated at the federal level, and that professional boxing is making efforts to improve financial conditions for fighters).

¹⁶³ See Howard, *supra* note 9, at 114; see also *supra* notes 159–60 and accompanying text (noting that in 1998 McCain attempted unsuccessfully to pass the Muhammad Ali Boxing Reform Act that would have placed additional federal regulations on the sport).

¹⁶⁴ See Brubaker, *supra* note 129, at C3. Congressman Richardson states, “boxing differs from the other professional sports in that you’ll never find a situation where one team owner could overrule the commissioner of football. In boxing, a promoter with a financial interest tells the governing bodies of the sport what to do.” *Id.*

¹⁶⁵ It is possible for a union to exist that does not meet the requirements (and does not gain the protection) of the NLRA. However, given the nature of relations between boxers, managers, and promoters within the sport, the only way professional boxers could be assured equitable bargaining power is through federal labor law protection.

¹⁶⁶ See, e.g., HELYAR, *supra* note 25, at 18–38 (detailing the history of scandal, lack of pensions, and low pay before the unionization of Major League Baseball); JAMES EDWARD MILLER, *supra* note 24, at 12–14.

¹⁶⁷ See HELYAR, *supra* note 25, at 16–38 (detailing the lack of benefits Major League Baseball players received before instituting a full-time union); JAMES EDWARD MILLER, *supra* note 24, at 13 (stating that the first pension plan was enacted in the 1940s because of owners’ fears of baseball unionization).

¹⁶⁸ See Hobel, *supra* note 27, at 164–69 (detailing the evolution of free agency and the role of sports labor unions); see also Peter N. Katz, *A History of Free Agency in the United States and Great Britain: Who’s Leading the Charge?*, 15 COMP. LAB. L.J. 371, 375–80 (1994) (describing restrictions on baseball players’ movement between teams).

professional athletes in team sports dramatically improved working conditions and financial stability.¹⁶⁹

However, the NLRB has never considered whether a professional boxers' union would fall within the jurisdiction of the NLRA.¹⁷⁰ Indeed, it is unclear whether the Board would even define professional boxers as employees under the NLRA—a requirement to unionize under the statute. This Part will argue that a proper application of the NLRB's employment-status test would define professional boxers as employees, thus enabling them to collectively bargain with boxing promoters and other management in an attempt to secure a universal standard of physical and financial security during and after their careers without further federal statutory intervention.

Section A of this Part will provide a brief overview of the NLRA, as well as the statute's primary requirements for unionization. Section B will detail the case law and statutory history surrounding the employment-status test of the NLRA, concluding with the factors the NLRB currently applies in determining whether an individual falls under the NLRA's ambit. Section C will then apply these factors, along with analogous case law, arguing that professional boxers should be considered employees under the statute.

A. *The National Labor Relations Act and its Requirements for Unionization*

The modern-day NLRA was the result of the evolution of several fair labor statutes passed during the New Deal era of the late 1920s and early 1930s.¹⁷¹ First passed in 1935, the NLRA grants "employees" statutory rights against management in their given industries. Chief among these are the rights to organize unions¹⁷² that serve as the exclusive representatives¹⁷³ for labor interests in their field, to bargain collectively with management on issues related to the workplace, and to strike and picket peacefully when bargaining is ineffective.¹⁷⁴ The NLRA also authorizes the NLRB as the chief decisionmaking and prosecutory body in conflicts that arise under the statute.¹⁷⁵

¹⁶⁹ See, e.g., McCormick, *supra* note 156; MARVIN MILLER, *supra* note 24 (detailing the strides baseball players made after unionization).

¹⁷⁰ See 29 U.S.C. §§ 151–69 (1994).

¹⁷¹ These statutes included the Railway Labor Act of 1926, designed to peacefully settle disputes between railway workers and management, and the Norris-LaGuardia and Wagner Acts, which served as the precursor to the modern NLRA. See generally MELVIN DUBOFKY, *THE STATE AND LABOR IN MODERN AMERICA* (1994).

¹⁷² See 29 U.S.C. § 157 (1994).

¹⁷³ See *id.* § 159(a).

¹⁷⁴ See *id.* § 157.

¹⁷⁵ See *id.* § 153. Prior to the establishment of the NLRA, the Board decided cases arising under the Wagner Act. See generally DUBOFKY, *supra* note 171.

However, several occupational groups fall outside of the NLRA's jurisdiction and thus receive no federal protection for their union activities. First, the statute applies to only employees of industries affecting commerce.¹⁷⁶ Theoretically, this would seem to include all industries if one applies the Supreme Court's Commerce Clause test.¹⁷⁷ However, as a practical matter, the NLRB has refused to provide jurisdiction (and therefore the protection of the NLRA) over industries that do not have a "substantial" effect on interstate commerce.¹⁷⁸ In defining this standard, the NLRB has established minimum dollar limits for most industries that an employer must exceed in order to meet the substantial effect requirement.¹⁷⁹

The NLRB has not established a pre-set limit for industries within professional sports,¹⁸⁰ preferring to judge these on a case-by-case basis. However, it has found that most of the professional sports organizations, including relatively smaller revenue sports, have met the substantial effect standard.¹⁸¹ In *Major*

¹⁷⁶ See 29 U.S.C. § 152 (1994).

¹⁷⁷ See U.S. CONST. art. I, § 8, cls. 1 & 3; *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (allowing Congress to regulate the production of wheat grown and consumed entirely on one farm under the Commerce Clause because changes in the amount of wheat grown at that farm may affect the interstate import of wheat). Indeed, for several years the Court took an expansive view of what applied under the Commerce Clause. However, in *U.S. v. Lopez*, 514 U.S. 549, 567-68 (1995), the Court held that possession of guns in a public school did not affect interstate commerce and was beyond congressional authority to regulate under the Commerce Clause. This was the first time in more than fifty years that the Court had struck down a federal law for not meeting the Commerce Clause requirement. For additional analysis on the Commerce Clause and its changing role under the Court, see, e.g., Lee G. Grabel, *United States v. Lopez and the Constitutionality of the Child Support Recovery Act of 1992: Dancing Precariously on the Head of the Commerce Clause Pin*, 28 RUTGERS L.J. 491, 493-507 (analyzing "[w]hether *Lopez* has gutted the Commerce Clause, leaving it a limp and frail creature of the shadows"); Peter A. Lauricella, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1380-82 (1997) (arguing that the Court should continue to follow *Lopez* in applying the "original intent" of the Commerce Clause and return to the states their traditional governing powers).

¹⁷⁸ See *Major League Rodeo, Inc.*, 246 N.L.R.B. 743, 744 (1979) (noting that the NLRB has established minimum profit standards that a business must reach before the NLRB will exercise jurisdiction).

¹⁷⁹ See, e.g., *Tatm Realty Corp.*, 322 N.L.R.B. 863, 863 (1997) (adopting a \$500,000 jurisdictional standard over retail businesses); *United Way of Howard County*, 287 N.L.R.B. 987, 987-88 (1988) (adopting a \$250,000 jurisdictional standard for social service organizations); *Rebecca Blaylock Nursery Sch., Inc.*, 260 N.L.R.B. 1428, 1428 (1982) (reaffirming a \$250,000 jurisdictional standard for day-care centers).

¹⁸⁰ See *Major League Rodeo, Inc.*, 246 N.L.R.B. at 744 n.7 ("The Board, in its assertion of jurisdiction over professional sports employers, has not previously established a specific discretionary jurisdictional standard, and we decline to do so herein.").

¹⁸¹ See *Volusia Jai Alai, Inc.*, 221 N.L.R.B. 1280, 1282 (1975) (asserting jurisdiction over

League Rodeo, Inc.,¹⁸² for example, the NLRB ruled that a rodeo league that traveled between six states and received in excess of \$281,000 met the substantial effect on commerce requirement.¹⁸³

While the NLRB has never explicitly ruled on whether professional boxing substantially affects interstate commerce, the financial revenue of the boxing industry seems to make it extremely likely that the sport would meet the standard. Boxing is a billion dollar industry with fans typically spending \$500 million dollars a year nationwide on tickets and pay-per-view television broadcast fees alone.¹⁸⁴ Thus, considering the NLRB's exercise of jurisdiction in smaller-revenue sports, such as in *Major League Rodeo*, it is a near-certainty that professional boxing would meet the NLRB's commerce test.

B. Agency Principles and a Professional Boxer's Employee Status

However, even if professional boxing meets the commerce standard, boxers may only unionize under the NLRA if they are considered employees under the statute.¹⁸⁵ In order to determine who is defined as an employee under the law, one must look to both statutory and case law history that have attempted to distinguish employees under the NLRA.

Early NLRB cases, supported by the Supreme Court, relied on an economic realities test in determining whether an individual was an employee for purposes of the NLRA. In *NLRB v. Hearst*,¹⁸⁶ for example, the Supreme Court upheld the

a jai alai fronton (arena)); American League of Prof'l Baseball Clubs, 180 N.L.R.B. 190, 190 (1969) (asserting jurisdiction over Major League Baseball). But see *Yonkers Raceway, Inc.*, 196 N.L.R.B. 373, 373 (1972) (declining to assert jurisdiction over local horse racing track).

¹⁸² 246 N.L.R.B. 743 (1979).

¹⁸³ See *id.* at 744.

¹⁸⁴ See Lane, *supra* note 13, at 204.

¹⁸⁵ See 29 U.S.C. § 157 (1994) (covering the scope of who may organize, as well as what actions they may take as a labor organization, by stating, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . ."). Thus, the statute clearly mandates that in order to have the right to bargain collectively, an individual must be an employee. Early court cases rejected common law tests of employee status and instead applied an economic realities test to determine whether an individual was considered an employee for statutory purposes. See *NLRB v. Hearst*, 322 U.S. 111, 124, 131–32 (1944) (holding that Congress did not intend to apply variations of a common law definition of employee, and upholding the NLRB's examination of the economic relationship between an employer and the individual in determining that a group of newspaper workers were employees under the NLRA). Responding to the *Hearst* decision, Congress passed the Taft-Hartley Amendment to the NLRA, specifically excluding individuals considered independent contractors. See *infra* note 189 and accompanying text.

¹⁸⁶ 322 U.S. 111, 131–32 (1944) (*overruled by* *NLRB v. United Ins. Co. of America*, 390

NLRB's application of an economic realities test in determining that a group of newspaper vendors¹⁸⁷ were employees as defined by the NLRA. According to the Court, the fact that the publisher controlled where the vendors could work, as well as the supply and prices of papers, was enough for the NLRB to reasonably conclude that the vendors were the publisher's employees under the NLRA.¹⁸⁸

However, in response to *Hearst*, Congress amended section 2 of the NLRA¹⁸⁹ to restrict the Supreme Court-supported economic realities test of employee status. While section 2 broadly defines the term "employee,"¹⁹⁰ it also lists classes of individuals who are excluded as employees under the NLRA. Among these,¹⁹¹ the section states that an employee "shall not include any individual . . . having the status of an independent contractor. . . ."¹⁹² While the NLRA does not specifically define the term "independent contractor," Congress

U.S. 254, 256 (1968)).

¹⁸⁷ See *Hearst*, 322 U.S. at 116–18. The newspaper vendors were "newsboys"—generally mature men who sold papers in high-traffic areas of Los Angeles and the surrounding area. The newsboys received newspapers from the company's district manager, distributed some to other vendors located in lower traffic areas, and sold the rest to passersby. The company's district manager controlled what hours the newsboys worked as well as where they were stationed. In return, the newsboys kept the profits they made from selling the newspapers.

¹⁸⁸ See *id.* at 131–32. For a further analysis of *Hearst*, see, e.g., Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. L.J. 75, 106–08 (1997) (detailing the factors of economic dependency in the *Hearst* case and applying them to the economic realities test).

¹⁸⁹ These amendments were known collectively as the Taft-Hartley Act. For a detailed history of Taft-Hartley, see generally Steven E. Abraham, *The Impact of the Taft-Hartley Act on the Balance of Power in Industrial Relations*, 33 AM. BUS. L.J. 341 (1996) (discussing the history of Taft-Hartley); Nelson Lichtenstein, *Taft-Hartley: A Slave Labor Law?*, 47 CATH. U. L. REV. 763 (1998) (discussing the socioeconomic impact and origins of Taft-Hartley).

¹⁹⁰ See 29 U.S.C. § 152(3) (1994) Section 2 states that:

The term 'employee' . . . shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

Id.

¹⁹¹ See *id.* In addition to independent contractors, the section excludes "agricultural laborers," domestic servants of any "family or person at his home," anyone employed by his parent or spouse, any supervisor, or anyone working for an employer covered by the Railway Labor Act. *Id.* Because professional boxers clearly do not fall under any of these categories, these classes are not analyzed in this Note.

¹⁹² *Id.* The NLRA also excludes certain classes of employers from its requirements under 29 U.S.C. § 152(2) (1994)—in effect excluding the employees of these employers. Among the employers excluded are federal, state, and municipal entities. Because boxing promoters and managers are not among the excluded employers, section 152(2) is not analyzed here.

made clear that the term was placed within the NLRA to overrule the economic factors test applied in *Hearst*. The House Committee Report first noted that “[I]n the case of *NLRB v. Hearst Publications, Inc.*, the Board expanded the definition of the term “employee” beyond anything that it ever had included before, and the Supreme Court upheld the Board.”¹⁹³ The Supreme Court reasoned that:

there always has been a difference, and a big difference, between “employees” and “independent contractors.” “Employees” work for wages or salaries under direct supervision. “Independent contractors” undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but . . . upon profits. . . . To correct what the Board has done . . . the bill excludes “independent contractors” from the definition of “employee”. [sic]¹⁹⁴

Thus, in applying this new standard, the Supreme Court overturned its prior decision in *Hearst* when it held that the NLRB eschew the economic realities test in favor of a broad application of agency principles when determining employee status in *NLRB v. United Ins. Co. of America*.¹⁹⁵ However, despite the Court’s endorsement of applying the broad range of agency principles, it refused to prioritize them. Instead, it directed both the NLRB and reviewing courts to use and weigh factors depending on the circumstances of each case. According to the Court, “there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”¹⁹⁶

Since *United Insurance*, courts and the NLRB have continued to refuse to identify a specific formula to define an independent contractor.¹⁹⁷ Reviewing courts have relied on a variety of case-specific factors,¹⁹⁸ most of which are derived from the determination used in the Restatement (Second) of Agency.¹⁹⁹

¹⁹³ H.R. REP. NO. 80-245, at 18 (1947).

¹⁹⁴ *Id.*

¹⁹⁵ 390 U.S. 254 (1968).

¹⁹⁶ *Id.* at 258.

¹⁹⁷ See, e.g., *Herald Co. v. NLRB*, 444 F.2d 430, 433 (2d Cir. 1971) (concluding that no single agency principle is determinative in defining employee status); *NLRB v. Warner*, 587 F.2d 896, 899 (8th Cir. 1978) (assessing agency factors on a case-by-case basis in making the distinction between employees and independent contractors).

¹⁹⁸ See *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 446 (2d Cir. 1975) (determining an individual’s relationship to his employer requires “case-by-case determinations whether the relationship between a business enterprise and other persons is that of employer and employee” or is that of an independent contractor).

¹⁹⁹ See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). For decisions that have explicitly approved of the use of the factors enumerated in the Restatement (Second), see e.g. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94-95 (1995) (applying principles of the Restatement (Second) in determining whether paid union organizers were employees of

According to section 220(2), in determining whether a worker is an independent contractor, the fact finder must examine:

(a) the extent of the control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.²⁰⁰

Yet, in keeping with the malleable standard enunciated by *United Insurance*, courts will apply only the factors relevant to the given case, including additional factors not listed by the Restatement (Second) of Agency, if necessary. Thus, in determining whether boxers should be considered employees under the NLRA, one must focus upon the unique nature of the boxer's relationship with his promoter.

Because professional boxing is a sport in which the boxer contracts individually with the manager and the promoter and exerts a measure of control over his day to day training, cases involving the unionization of team sports would not necessarily apply.²⁰¹ However, while sports involving individual athletes may be more analogous, the NLRB has not considered the employee status of an athlete in any individual sport. For example, while the NLRB has considered the ability of jai alai²⁰² players to unionize, its analysis has focused on the commerce test and its jurisdiction over state-regulated industries rather than

petitioner); *Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1328-29 (D.C. Cir. 1971) (applying factors of agency relationship in the Restatement (Second) in holding that supervised truckers were employees under the NLRA).

²⁰⁰ RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

²⁰¹ Indeed, neither the NLRB nor reviewing courts have fully considered the specific issue of whether athletes on sports teams are independent contractors. The question arose but was dismissed in *Major League Rodeo, Inc.*, 246 N.L.R.B. 743, 744 n.4 (1979) ("[T]he Employer argued that the Board lacks jurisdiction over it because its employees were . . . independent contractors. The Employer has not raised these contentions in its brief to us. In any event, the record is devoid of evidence supporting such contentions, and we find them without merit.").

²⁰² Jai alai is a sport similar to handball. Players catch and throw a ball within a three-walled court using a curved basket called a cesta. See *Volusia Jai Alai*, 221 N.L.R.B. 1280, 1280 (1975). The players sign short-term work contracts for the jai alai season at each fronton, then move to the next fronton. See *id.* at 1281 n.2.

on the employment-status test.²⁰³ However, because of the unique status of fighters relative to promoters, the NLRB is more likely to apply the employment-status test when determining whether boxers may unionize.²⁰⁴

Thus, in order to determine a boxer's employment status under the NLRA, it is first necessary to look to the agency factors relevant to the boxer's working conditions²⁰⁵ and then to analyze how these factors were applied to labor cases outside of professional athletics that involved employment relationships similar to that of the boxer and the promoter.

In determining an employee's status under the NLRA, although none of the agency factors are dispositive in every case, courts often give primary weight to the "right to control" test—the extent to which the employer may exercise control over the agent's work.²⁰⁶ As noted previously, promoters, through their exclusive

²⁰³ See *id.* at 1282 (holding that the NLRB can take jurisdiction over an otherwise state-regulated industry because the state only regulates the pari-mutuel aspect of the industry); *Grand Resorts, Inc.*, 221 N.L.R.B. 539, 539–40 (1975) (holding that jai alai met the NLRB's commerce jurisdictional requirement based in part on the fact that the resort used the players in its promotional advertisements that brought tourists from out of state).

For an analysis of agency principles arguing in favor of professional wrestlers being considered employees under the NLRA, see Stephen S. Zashin, *Bodyslam from the Top Rope: Unequal Bargaining Power and Professional Wrestling's Failure to Unionize*, 12 U. MIAMI ENT. & SPORTS L. REV. 1, 24–54 (1994–95) (arguing primarily that because professional wrestling is "fixed" with wrestling syndicate promoters scripting the matches, the promoters qualify as employers under the NLRA).

²⁰⁴ In *Volusia Jai Alai*, the Court detailed the fact that fronton associates paid for player training, moving expenses, etc. See *Volusia Jai Alai*, 221 N.L.R.B. at 1280. The frontons thus had total control over the training, the hiring and firing of coaches, etc. Additionally, jai alai players participate in matches nightly during the season. See *id.* Although jai alai players participate in an individual sport per se, there is more day to day employer control over the athletes than in a sport such as boxing. Indeed, the popular media have portrayed boxers as independent contractors. See Lane, *supra* note 13, at 206 (describing boxers as independent contractors).

²⁰⁵ See *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596, 597 (1st Cir. 1974) (noting courts must first look to relevant agency factors).

²⁰⁶ See *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995) (quoting the NLRB's determination that "an employer-employee relationship exists when the employer reserves not only the right to control the result achieved, but also the means to be used in attaining the result"); *Seven-Up*, 506 F.2d at 597 ("The right to control the manner of physical performance of the services—as opposed to control over the results sought—is generally determinative of employee status, although a number of matters of fact must be considered in making that determination."). Indeed, the Supreme Court gave the "right to control" test an arguably more liberal interpretation three years ago by ruling that union-paid agents who took jobs with an employer solely for the purpose of organizing a union at that employer's workplace are still considered employees of the workplace, because the employer had a right to control their day to day work activities. See *NLRB v. Town & Country Elec.*, 516 U.S. 85, 94–95 (1995); see also Gregory C. Kloeppel, *Salt Anyone? The United States Supreme Court Holds That Paid Union Organizers Qualify as Employees Under the NLRA in NLRB v. Town*

representation contract, have the power to determine each of a boxer's opponents. In addition, the promoter, with input from a fighter, has the right to negotiate the time and place of the bout.²⁰⁷ Thus, while the promoter may not exercise control over the day to day training of the fighter, who names his own trainers and cornermen,²⁰⁸ the promoter nonetheless controls the most vital economic elements of the fighter's career.²⁰⁹

Indeed, reviewing courts have given great weight to the overall control an employer may exert in determining employee status. For example, the First Circuit held that soda distributors who were tied to exclusive contracts with the Seven-Up Bottling Company and whose sales territory was controlled by the company were employees, despite the fact that the distributors hired and paid assistants to make deliveries and set their own daily schedules.²¹⁰ According to the court, the independence the distributors had in their day to day operations was outweighed by the overall control the company exerted.²¹¹

In another distribution case,²¹² the Sixth Circuit agreed with the weight the

& Country Electric, Inc., 42 ST. LOUIS U. L.J. 243, 258-65 (1998) (analyzing the Court's expansion of the statutory definition of employee).

²⁰⁷ See *supra* notes 42-50 and accompanying text.

²⁰⁸ See, e.g., BERGER, *supra* note 31, at 253-60 (detailing Mike Tyson's firing of Kevin Rooney as his trainer and hiring of Aaron Snoweel, a childhood friend of his); HAUSER, *supra* note 31, at 77-101 (detailing boxer Billy Costello's selection of cornermen, and trainers along with input from his manager).

²⁰⁹ See *supra* notes 42-62 and accompanying text (detailing the authority of a promoter to select opponents, set fight dates, and negotiate fight purses with broadcast agencies and site organizers).

²¹⁰ See *Seven-Up*, 506 F.2d at 600, in which the court wrote:

The record amply supports the Board's conclusion that the company has the right to, and does, control the distributors' performance of their duties—not by any formal authority, but by means of suggestions which are adhered to because of the company's power to grant and revoke distributorships and to alter their value at will.

Indeed, this is akin to a promoter's power over a professional boxer. A promoter can control a fighter's career, as well as how much money he may make over the minimum purse-per-bout clause by selecting the competitors the fighter will face.

²¹¹ See *id.* at 600 (holding that the NLRB's weighing of the appropriate agency factors was reasonable under the circumstances).

²¹² See *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969). The NLRB, as well as reviewing courts, has been relatively liberal in granting employee status to distributors and drivers, in which the employers have less "hands-on" supervisory control of day to day operations. Conversely, the NLRB has been relatively strict in its application of the right of control test with regard to entertainers, where supervisors take more of an active role in the oversight of the work. Compare *St. Charles Journal, Inc. v. NLRB*, 679 F.2d 759, 761 (8th Cir. 1982) (upholding an NLRB decision that newspaper distributors were employees of a publisher despite their overall freedom on their day to day route), and *Seven-Up*, 506 F.2d at

NLRB gave to the existence of the exclusive contract the distributor was required to sign, the publisher's control of sales territory, and the indefinite length-of-service clauses in determining that a group of newspaper distributors were employees of their publisher. According to the court, these three characteristics evidenced a right of control over the distributors that plausibly outweighed the distributors' entrepreneurial interest in the resale of the newspapers.²¹³

As in these cases, promoters, while lacking day to day control over a professional fighter, nonetheless limit his ability to fight through the use of the exclusive representation contract. Indeed, a promoter, through the use of this power, can force a champion whom he represents to relinquish his title belt by refusing to promote a fight against a mandatory challenger.²¹⁴ Thus, the overall control that a promoter exerts over a fighter's career is at least as extensive as that in both *Seven-Up* and *Brush-Moore*.

An additional factor that lends support for a fighter's status as an employee under the NLRA is his role within the fight promotion itself. As explained in *United Insurance*,²¹⁵ one of the factors that led the Supreme Court to rule that the insurance company's debit agents at issue were employees was the fact that the agents "do not operate their own independent businesses, but perform functions

600, and *Brush-Moore*, 413 F.2d 809, with *Comedy Store*, 265 N.L.R.B. 1422, 1449–50 (1982) (holding comedians are independent contractors because of their short-term, nonguaranteed work at a nightclub), and *American Broadcast Co.*, 117 N.L.R.B. 13, 18 (1957) (finding that musical composers were independent contractors because the Company hired the composers on short-term contracts, and, while the company supervised the end result, it did not control the manner in which the result was accomplished). But see *Nevada Resort Ass'n*, 250 N.L.R.B. 626, 626 (1980) (holding that a hotel's lounge musicians were employees of the hotel, despite the fact that they did not have the same constraints as members of the hotel's orchestra). It is arguable that because of the long-term, exclusive relationship of boxing contracts, boxers are more akin to distributors than entertainers under short-term contract that the NLRB has considered.

²¹³ See *Brush-Moore*, 413 F.2d at 814–15 (holding the exclusive nature of the contract to outweigh the fact that a provision in the contract deemed the workers as independent contractors); see also *Seven-Up*, 506 F.2d at 600 ("It is significant that none of the distributors—whatever their theoretical freedom to deliver non-competing products—perform delivery services for anyone but the company."). Additionally, the court in *Brush-Moore* considered the fact that the distributors had a small risk of loss so long as the employer provided the papers. See *Brush-Moore*, 413 F.2d at 815 ("The risk of loss is another factor to be considered in determining whether the status is that of employer-employee or that of an independent contractor. Here, the newsstand operators' risk of loss is minimized."). This is analogous to the working conditions of professional boxers, where the boxer's risk of loss is minimized due to the minimum purse-per-bout clause, while the promoter may actually lose money, especially early in a fighter's career. See *supra* notes 44–46 and accompanying text.

²¹⁴ See *supra* notes 48–52 and accompanying text.

²¹⁵ See *supra* notes 195–204 and accompanying text (explaining *United Insurance* and the Court's application of agency standards, including the employee's relationship to the central function of the business).

that are an essential part of the company's normal operations"²¹⁶ Similar to *United Insurance*, professional fighters are an "essential part" of a promoter's operations. Indeed, it is impossible to promote a fight without the fighters themselves.

Conversely, certain factors lead one to view professional fighters as independent contractors. Perhaps the primary element that, on its face, argues a boxer's status as an independent contractor is the promotional contract itself. Promotional contracts explicitly stipulate that the fighter is deemed an independent contractor and withhold no employee benefits.²¹⁷ Additionally, as noted above, the fighter exerts fairly wide control over his choice of trainer, and thus, his day to day training regimen.²¹⁸ However, case law suggests that these factors, when weighed against the broader control a promoter exerts over a fighter, would not be enough to establish the fighter as an independent contractor.

Indeed, in *Herald Co. v. NLRB*²¹⁹ the Second Circuit upheld an NLRB determination that newspaper distributors were employees, despite contracts that classified the distributors as independent contractors.²²⁰ According to the court, the fact that the distributors were part of an essential function of the publication, combined with the overall control the company exerted over its distributors' income (through contractual minimums and delivery limits), outweighed the form designation.²²¹

Finally, after applying the most relevant agency relationship factors, it is illuminative to re-examine the House Report, which provides the only working definition the legislature proffered regarding the employment status test. According to the House Report of Taft-Hartley, "[e]mployees' work for wages or salaries under direct supervision. 'Independent contractors' . . . depend for their income not upon wages, but . . . upon profits."²²² Most boxers, because of their contractual minimum purse-per-bout guarantees, depend primarily on wages, while promoters, whose income is dependent on the success of the fight they have arranged, take the profits or losses of the arrangement. Thus, when taken in

²¹⁶ *Id.* at 259.

²¹⁷ See *Hearings on Boxing Rules Revision*, *supra* note 12 (statement of Sen. John McCain) (stating that federal regulation is necessary for boxers because of their independent contractor status and referring to the explicit language in most boxing promotional contracts).

²¹⁸ See *supra* Part IV.B.

²¹⁹ 444 F.2d 430 (2d Cir. 1971).

²²⁰ See *id.* at 435; see also *Brush-Moore*, 413 F.2d at 814-15 (finding that the term "independent contractor" on the employment contract has little weight in light of the employer's overall right to control).

²²¹ See *Herald Co.*, 444 F.2d at 435.

²²² H.R. REP. NO. 80-245, at 18 (1947).

combination with all of the relevant agency factors, it seems clear that professional boxers meet the NLRB's employment status test under the NLRA.

V. CONCLUSION

Despite various federal attempts over the last four decades to regulate prizefighting, the average boxer continues to be subject to long-term inequitable contracts that provide no financial security for his life outside the ring. Boxers are also subject to control at the hands of promoters who can send the fighter into a jurisdiction that inadequately protects him in the ring.

However, a boxing union would help to alter the balance of power within the sport. Individual professional boxers, who may have their careers stymied by promoters and allied sanctioning bodies should they demand safer working conditions, would instead be part of a group that could place a halt to the sport—and the promoters' and sanctioning agencies' income—by federally protected work stoppages until better working conditions were established.

As a practical matter, the NLRB would likely certify the class of licensed promoters as the management with whom the boxing union would negotiate. Thus, the largest potential direct effects of a boxing union would be on the average fighter's contract: shorter contract lengths, option clauses that provide the fighter more equitable bargaining power, terms that allow a fighter more of a choice in opponent selection, and pension plan arrangements. Moreover, the promoter's role in arranging fights, including venue selection and facilities preparations, also allows safety issues to be addressed in union negotiations, giving fighters—the individuals who are directly at risk of injury—a voice in establishing safety standards they consider acceptable.

While continued federal regulation may one day fully protect the interest of professional boxers, history suggests this process will be slow and controversial. Additionally, regulation at the federal level fails to provide boxers a voice in the operation of their own sport, instead leaving decisions on safety and financial issues up to individuals that may not "know a left hook from a fish hook."²²³ The alternative—a proper application of the employment status test by the NLRB, followed by the establishment of a professional boxing union—would provide boxers a role in the governance of their sport as well as aid in protecting their physical and financial interests. In other words, a favorable NLRB opinion would provide boxers the opportunity to fight for greater rights within their sport.

²²³ See Deitch, *supra* note 117, at 3.

